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MEMO ENDORSED

August 18, 2008

Via Federal Express

Hon. Lewis A. Kaplan

United States District Judge

United States Courthouse

500 Pearl Street

New York, NY 10007

USDS SDNY

DOCUMENT

ELECTRONICALLY FILED

DOC #:

DATE FILED: 9/5/08

Re: *Permasteelisa North America Corp v. Liberty Mut. Fire Ins. Co.*
Civil Action No.: 08 Civ. 4863

Dear Judge Kaplan:

This firm represents the plaintiff Permasteelisa North America Corp. ("Permasteelisa") in the above-captioned action. On Wednesday, August 13, 2008, Permasteelisa electronically filed the enclosed proposed Notice of Dismissal Without Prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). The following day, the Clerk's office rejected the proposed Notice "due to the filing of responsive pleading(s)." After further discussion with the Clerk's office, we were directed to contact your Honor to resolve the issue of whether Permasteelisa is permitted to voluntarily dismiss this action without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i).

Fed. R. Civ. P. 41(a)(1)(A) establishes that a "plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment..." As stated by the Second Circuit:

So long as plaintiff has not been served with his adversary's answer or motion for summary judgment he need do no more than file a Notice of dismissal with the Clerk...this is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court.

Thorp v. Scarne, 599 F.2d 1169, 1176 (2d Cir. 1979)(citations omitted).

To date, defendant Liberty Mutual Fire Insurance Company has not served either an answer or a motion for summary judgment in this action. A motion to dismiss has been decided


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in this action; however, the motion did not involve any substantive issues nor was it converted to a motion for summary judgment. Accordingly, Permasteelisa sought to voluntarily dismiss this action, as a motion to dismiss does not extinguish a plaintiff's right to voluntarily dismiss an action pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i). See *Seippel v. Jenkins & Gilchrist, P.C.*, 2004 U.S. Dist. LEXIS 24566 (S.D.N.Y. 2004)(see attached).


We respectfully request that your Honor direct the Clerk's office to accept for filing the enclosed proposed Notice of Dismissal Without Prejudice.

Respectfully submitted,


Robert J. Tracy (RT-5260)

Enc.

cc: Marshall A. Potashner, Esq. (via facsimile)

Granted. *Capstar Radio Corp. v. Campbell*
No. 08-cv-2976 (LAK) (SDNY dated May 27, 2008)
ORDERED

LEWIS A. KAPLAN, USDC
9/5/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
PERMASTEELISA NORTH AMERICA CORP.,

Plaintiff,

v.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY,

Defendant.
-----X

:
:
: Civil Action No. 08 Civ. 4863
: (LAK)(AJP)
:

: **NOTICE OF DISMISSAL**
: **WITHOUT PREJUDICE**
:


PLEASE TAKE NOTICE, that pursuant to Fed. R. Civ. P. 41(a), Plaintiff Permasteelisa North America Corp., by and through its attorneys, Clifton Budd & DeMaria, LLP, voluntarily dismisses the above-captioned action without prejudice.

Dated: New York, New York
August 13, 2008

Respectfully submitted,

CLIFTON BUDD & DeMARIA, LLP
Attorneys for Plaintiff

By: _____


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